# IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

***RSA No.144 of 2004***

***Reserved on: May 31, 2007***

**Decided on: *July 04, 2007.***

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***Jagdish Chand*** ***.....Appellant.***

***VERSUS***

***Parveen Kumar & Others*** ***.....Respondents.***

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***Coram***

**The Hon'ble Mr.Justice Kuldip Singh, Judge.**

***Whether approved for reporting?[1] Yes***

**For the Appellant:** **Pt.Om Parkash, Advocate.**

**For the Respondents:** **Mr.Anuj Nag, Advocate.**

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***Kuldip Singh, Judge***

This appeal has been filed by Jagdish Chand defendant No.1 against the judgment and decree dated 1.3.2004 passed by District Judge, Kangra at Dharamshala in Civil Appeal No.44-D/XIII/2003 reversing the judgment and decree dated 28.2.2003 passed by learned Sub Judge 1st Class(2), Dharamshala in Civil Suit No.47 of 2001. The parties are referred in the same manner as in the trial Court.

***2.*** The facts, as emerge from the plaint, are that plaintiff Parveen Kumar filed a suit for possession against defendant No.1 Jagdish Chand on the ground that tenancy of defendant No.1 has

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[1] ***Whether the reporters of the local papers may be allowed to see the Judgment? Yes***

been terminated vide notice dated 27.12.2000. He was called upon to hand over the possession of shop No.1 on or before 1.2.2001 and pay the arrears of rent. The further facts are that plaintiff is owner of shops No.1 to 5 shown in the site plan at *Siri Nadikeshwar Dhaam, Chamunda, Tehsil Dharamshala, District Kangra.* Defendant No.1 was a tenant in shop No.1 on Rs.700/- per month. In October 2000 the said shop was partly damaged in fire but defendant No.1 without the consent of the plaintiff renovated the damaged shop and continued business therein despite the fact that he was employed in the Postal Services at Chamunda. The defendant No.1 failed to hand over the possession of the shop, therefore, the suit was filed.

***3.*** The suit was contested by defendant No.1 by filing written statement in which he has taken preliminary objections of lack of cause of action, *locus-standi, resjudi-cata* and valuation. On merits, he has not specifically denied the ownership of the plaintiff of the shop when defendant No.1 was inducted as tenant in the shop. He has pleaded that now plaintiff is not owner of the shop. On 19.10.2000 the shops No.1 to 5 were destroyed in the fire. The proforma defendants No.2 and 3 are the owners of the land beneath the shop. The shop No.1 after fire was reconstructed by defendant No.1. The rent of the shop is Rs.600/- per month and not Rs.700/-. The defendant No.1 has not pleaded ownership of the shop in himself.

***4.*** The trial Court dismissed the suit on 28.2.2003 against which defendant No.1 filed the appeal which has been allowed by the

learned District Judge, hence, defendant No.1 is in appeal in this Court. The appeal has been admitted on the following substantial questions of law:-

*(i) Whether in the facts proved on the record of the case the tenancy created by plaintiff / respondent stood expired and respondent / plaintiff has no locus standi to terminate the tenancy thereafter?*

(ii) *Whether in view of the facts that subject matter of tenancy was totally destroyed by fire and thereafter the appellant / defendant constructed the new shop and paid the rent to the owner of the land beneath shop, the learned District Judge has wrongly applied the principle of estoppel under Section 116 of the Evidence Act against the appellant / defendant instead of Section 108(e) of Transfer of Property Act?*

***5.*** I have heard the learned counsel for the parties and have also gone through the record.

***6.*** The learned counsel for defendant No.1 has submitted that the shop in question was destroyed in fire. Thereafter, defendant No.1 reconstructed it and plaintiff is not the owner of the shop, therefore, he is not entitled to possession of the shop. The learned counsel for the plaintiff has supported the impugned judgment and decree.

***SUBSTNATIAL QUESTIONS OF LAW NO.1 AND 2:***

***7.*** Ext.PW-1/B is the rent note executed in between plaintiff and defendant No.1 of the shop. Defendant No.1 while appearing as DW-1 has admitted his signatures on Ext.PW-1/B, he has also stated that he signed Ext.PW-1/B only after talk of renting out of the shop had taken place. He has admitted that he had been paying rent some times to plaintiff and some times to Puneet. Thus, it is clear that defendant No.1 is a tenant of the shop under plaintiff. In his written statement also, the defendant No.1 has admitted that rent of the shop is Rs.600/-. In other words, the defendant No.1 has never claimed the ownership of the shop in himself. The defendant No.1 is estopped to challenge the title of the plaintiff under Section 116 of the Evidence Act.

***8.*** The learned counsel for defendant No.1 has urged that shop in question was destroyed in fire and he has reconstructed it, therefore, the plaintiff is not entitled to seek his eviction. This submission has no force. As per Section 108(e) of the Transfer of Property Act if material part of the leased out property is wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let, the lease shall, at the option of the lessee, be void. It is not the case of defendant No.1 that after alleged fire he exercised the option for declaring the lease void. If the leased property is destroyed in the fire, the lease cannot be said to be extinguished unless lessee exercise such option. In ***Hind Rubber***

***Industries Pvt. Ltd. Versus Tayebhai Mohammedbhai Bagasarwalla and Others [AIR 1996 Bombay 389]*** in Para-16 it has been held as follows:-

> "It may be observed that Section 108 of the T.P.Act deals with the rights and liabilities of lessor and lessee and Part-B and clause (e) of Section 108 provides that if the property leased in wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was leased by fire, tempest or flood or violence of any army or of a mob or other irresistible force, such lease may be rendered void at the option of the lessee provided of course that such injury to the lease property has not been occasioned by the wrongful act or default of the lessee. That means that right of the lessee in the leased property subsists even if the leased property has been destroyed by fire, tempest or flood or violence of an army or of a mob or other irresistible force unless the lessee exercises his option that on happening of such events the lease has been rendered void. By necessary corollary, therefore, if the leased property is destroyed wholly by fire, the lease cannot be said to be extinguished, nor can it be said that lessee's right in the leased property has come to an end unless the lessee exercises such option. The express provision in clause (e) of Section 108 leaves no manner of doubt that on destruction of leased property by fire, the lease cannot be said to be extinguished automatically……."

***9.*** The lease of a house or a shop is not only of the structure but also of its site. The defendant No.1 has projected the case that shop in question was destroyed in fire. It is not his case that site of the shop as well as land beneath the shop ceased to exist. In ***T.Lakshmipathi and Others Versus P. Nithyananda Reddy & Others [( 20030 5 SCC 150],*** the Supreme Court has held as follows:-

> "22. A lease of a house or of a shop is a lease not only of the superstructure but also of its site. It would be different if not only the site but also the land beneath ceases to exist by an act of nature. In the present case, the appellants who are the successors of the tenancy right have demolished the superstructure but the land beneath continues to exist. The entire tenancy premises have not been lost. Moreover, the appellants cannot be permitted to take shelter behind their own act prejudicial to the interest of respondent 1 under whom respondents 2 and 3 were holding as tenants and then inducted the appellants.
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> 23. In *D.G. Gose & Co. (Agents) (P) Ltd. V. State of Kerala [(19800 2 SCC 410]* while dealing with Entry 49 of List II of the Seventh Schedule of the Constitution, making a reference to *Oxford English Dictionary,* this Court has held that the site of the building is a component part of the building and therefore inheres in it the concept or ordinary meaning of the expression "building". Referring to

> *Corpn. Of the City of Victoria v. Bishop of Vancouver Island [AIR 1921 PC 240],* it was held (at SCC p.425 para 22) that the word "building" must receive its natural and ordinary meaning as "including the fabric of which it is composed, the ground upon which its walls stand and the ground embraced within those walls."
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> 24. We are, therefore, of the opinion that in the event of the tenancy having been created in respect of a building standing on the land, it is the building and the land which are both components of the subject matter of demise and the destruction of the building alone does not determine the tenancy when the land which was the site of the building continues to exist……."

***10.*** In the present case, it has been proved on record that defendant No.1 was inducted tenant by plaintiff vide rent note Ext.PW-1/B which was for limited period but thereafter defendant No.1 shall be deemed to continue in the premises on same terms and conditions. The defendant No.1 continued to be the tenant in the shop in question after it was damaged in fire. Even if it is assumed that whole of the shop was destroyed in fire and it was reconstructed by defendant No.1 in that case also in view of ***T.Lakshmipathi's case (supra)*** the defendant No.1 will continue to be the tenant of plaintiff. The tenancy of defendant No.1 has been terminated. The learned District Judge has rightly considered the material on record and decreed the suit for possession of plaintiff. The learned counsel for defendant No.1 has

failed to make out any case for interference. The substantial questions of law No.1 and 2 are decided against defendant No.1 and in favour of the plaintiff.

***11.*** The result of the above discussion is that the appeal is dismissed. No costs.

***July 04, 2007*.** **( *Kuldip Singh )***
***(soni)*** ***Judge***